IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
RANDY DIXON	:	NO. 98-228

MEMORANDUM

Dalzell, J. July 16, 1998

Defendant Randy Dixon filed a motion seeking to suppress evidence seized and statements taken by United States Deputy Marshals on October 29, 1997, while they executed an arrest warrant Judge Herbert J. Hutton had issued upon the report of Dixon's serial violations of the terms of his supervised release. Upon consideration of the parties' briefs, and after a hearing on July 14 on the matter, we find that (1) the search and seizure was not unreasonable because Dixon consented to it, and (2) Dixon made the inculpatory statements at issue after a knowing and voluntary waiver of his Miranda rights. Accordingly, we will deny Dixon's motion.[1]

I. Facts

A. Undisputed Facts

[1] As Dixon was scheduled to commence his trial after the suppression hearing on July 14, we announced our ruling from the bench at the close of the motion hearing that day. As it happens, Dixon thereafter elected to change his plea to guilty, conditioned upon his right to withdraw that plea if the Court of Appeals reverses our ruling on the suppression motion.

This memorandum amplifies on our oral ruling of July 14, and constitutes the complete and definitive basis for that ruling.

The parties agreed at the hearing to a number of uncontested facts. On October 11, 1990, after Dixon pled guilty to one count of distribution of cocaine within 1,000 feet of a school, in violation of 21 U.S.C. § 845a, and one count of arson, in violation of 18 U.S.C. § 844(i), Judge Hutton sentenced Dixon to a term of seventy-two months' incarceration, followed by a term of six years supervised release. See United States v. Randy Dixon, Crim. Nos. 89-234-11 and 89-477-1 (E.D. Pa., Judgment dated Oct. 11, 1990).

After Dixon's release from prison, and while he was on supervised release, on July 15, 1997 Supervisory United States Probation Officer Gail White-Agbugui petitioned Judge Hutton for a warrant for Dixon's arrest, submitting in support thereof a Violation of Supervised Release Report listing four pages of Dixon's alleged violations of the terms of his supervised release. On July 21, 1997, Judge Hutton signed and issued a warrant for Dixon's arrest.

Because Dixon was not residing at the address he gave his Probation Officer, the Marshals Service had to search for the defendant. On October 29, 1997, Deputy United States Marshal Dennis O'Brien received information from a confidential informant that Dixon was living in the first floor apartment at 927 N. American Street in Philadelphia, and that Dixon had a gun in the house or under the seat in his car. With Judge Hutton's arrest warrant in hand, Deputy Marshal O'Brien and seven other members of the United States Marshals Fugitive Task Force went to 927 N.

American Street to arrest Dixon. Two Deputy Marshals deployed in the rear of the house, while other Marshals -- led by Deputies O'Brien (first-in-line) and John Patrignani (second-in-line) -- knocked on the front door and announced their presence. Dixon unlocked the front door and let the Deputies in. The Deputies immediately arrested Dixon in his living room. While Deputy Patrignani handcuffed Defendant, Deputy O'Brien and other Deputy Marshals performed a protective sweep of the two-room apartment.

The parties differ over what happened next.

B. Disputed Facts

At the hearing, Deputy Patrignani testified that while Deputy O'Brien and other Deputy Marshals were performing the protective sweep, Deputy Patrignani advised Dixon of his Miranda rights, reading from a standard "Miranda card" the United States Marshals Service issued him. After reading the last sentence from the card: "Are you willing to waive your rights and talk with us?", see Govt. Ex. 1, Patrignani testified that Dixon said, "O.K." Dixon disputes that Deputy Patrignani read him his Miranda rights, and that he waived those rights. Deputy Patrignani testified that the following dialogue then took place with Dixon:[2]

Patrignani: "Where's the gun, Randy?"

Dixon: "It's under the bed."

Patrignani: "Can I go get that gun?"

Dixon: "Yes."

Patrignani then went into Dixon's bedroom and found, between the mattress and the box spring, an AMT .380 9mm "Backup" semiautomatic pistol, whose magazine was fully-loaded with five rounds of hollow point ammunition.[3] Next to the pistol was a

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[2] Deputy O'Brien testified that he did not hear Deputy Patrignani read Dixon his Miranda rights, because O'Brien was conducting the protective sweep at that time. Deputy O'Brien did, however, testify that he returned to Dixon and Patrignani in time to see Patrignani holding the Miranda card in his hand, and heard the interchange quoted in the text.

[3] ATF Agent Diane Pospyhalla testified that the points of bullets are hollowed out to increase the likelihood that those (continued...)

kevlar bullet-proof vest. Patrignani returned to the living room with the firearm and armor and asked Dixon if there were any additional weapons in the house. Dixon replied that there were none.

The Marshals then took Dixon to their cellblock on the second floor of this Courthouse. At about 10:00 a.m., Deputies O'Brien and Patrignani met with Dixon in an interrogation room in the cellblock.

The Deputies brought with them a "Waiver of Rights" form that was divided into two sections. The top section contained a written recitation of Miranda rights for the Deputies to read, as well as a signature line at the bottom of that section below the sentence, "I have read this statement of my rights and I understand what my rights are." See Govt. Ex. 2. Dixon signed below this statement in the top section. The bottom section of the form consisted of another signature line, below the following statement:

> I have read the above statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

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[3](...continued)
bullets will penetrate protective clothing. She also testified that this weapon's only purpose is to kill people.

Id. Dixon did not sign below this statement. Instead, Deputy O'Brien wrote, "refused to sign but is willing to answer questions," id., based on words to that effect from Dixon. According to the Deputies' testimony and the "Report of Investigation" Deputy O'Brien filled out after the interview, the Deputies then interviewed Dixon. In that interview, Dixon admitted that the gun[4] and vest were his. Although acknowledging that (a) the Deputies read him his Miranda rights, (b) he signed the form, and (c) he admitted ownership of the gun and vest in the interview, Dixon argues that he did not knowingly and voluntarily waive his Miranda rights because he refused to sign the waiver of rights form.

II. Analysis

Dixon has raised both Fourth and Fifth Amendment objections to the evidence seized and statements the United States Marshals took from him during his October 29, 1997 arrest. We will divide our analysis accordingly.[5]

A. Fourth Amendment's Prohibition Against Unreasonable Search and Seizure

[4] Agent Pospyhalla successfully test-fired the gun.

[5] Dixon does not challenge the validity of the underlying arrest warrant that brought the Marshals to his apartment that day.

The Fourth Amendment prohibits only unreasonable searches and seizures.[6] Harris v. United States, 331 U.S. 145, 150, 67 S.Ct. 1098, 1101 (1947). What is reasonable "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." United States v. Montoya de Hernandez, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308 (1985). The general rule is that "warrantless searches are presumptively unreasonable." Horton v. California, 496 U.S. 128, 133, 110 S.Ct. 2301, 2306 (1990). Courts have, however, fashioned exceptions to the general rule which recognize that in certain limited situations the Government's interest in

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[6] An interesting issue not briefed by either party is whether Dixon's Fourth Amendment rights are affected by the fact that he was on supervised release when the search and seizure took place. At first blush, it might appear that the Supreme Court's recent decision in Pennsylvania Bd. of Probation and Parole v. Scott, 118 S.Ct. 2014 (1998) (holding that the exclusionary rule does not apply in proceedings to revoke supervised release), is dispositive in extinguishing Dixon's Fourth Amendment rights because of his being on supervised release pursuant to Judge Hutton's 1990 Judgment.

The parallel to Scott is tempting, but we resist. The dispositive consideration in Scott was neither defendant's status nor the circumstances under which law enforcement officials searched for and seized the evidence, but rather the nature of the proceeding in which the evidence was to be introduced. See id. at 2020-22. Thus, while the Supreme Court in Scott again "declined to extend the exclusionary rule to proceedings other than criminal trials," id. at 2019, its underlying applicability to criminal trials remained, a fortiori, intact. See id. at 2022 (observing that "assuming that the search violated respondent's Fourth Amendment rights, the evidence could have been inadmissible at trial if respondent had been criminally prosecuted"). Thus, Dixon still has his Fourth Amendment rights for the purposes of this criminal prosecution. Although Dixon's status as a supervised releasee may push the bounds of Fourth Amendment reasonableness wider than they would be for a citizen not so recently adjudicated a criminal, we shall confine our analysis to traditional Fourth Amendment principles.

conducting a search without a warrant outweighs the individual's privacy interest. Montoya de Hernandez, 473 U.S. at 537, 105 S.Ct. at 3308 ("The permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'")(quoting United States v. Villamonte-Marquez, 462 U.S. 579, 588, 103 S. Ct. 2573, 2579 (1983)).

The Government primarily[7] seeks to justify the instant search and seizure on the grounds of consent, a well-established exception to the exclusionary rule. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973). Consent to search is a question of fact to be determined from the totality of the circumstances. Bolden v. SEPTA, 953 F.2d 807, 824 (3d Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1093 (3d Cir. 1990). Proof of knowledge of the right to refuse consent, however, is not a necessary prerequisite to a finding of legally efficacious consent. Schneckloth, 93 S.Ct. at 2050-51.

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[7] The Government in its opposition papers also argued that the search and seizure was justified as a search incident to a lawful arrest, an exception first set forth in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969). The Government did not, however, press this exception at the motions hearing, and we are unconvinced that the arm and armor seized from under Dixon's bed -- more than twenty feet and in a different room from where he was arrested -- were at the time of his arrest in "the area within his immediate control." See id. at 763; see also id. at 763 (stating that the exception offers "no comparable justification . . . for routinely searching any room other than that in which an arrest occurs . . ."). We therefore reject that exception as inapplicable on these facts.

Dixon attempted through cross-examination and at oral argument to undermine the credibility of the uncontroverted testimony of Deputies Patrignani and O'Brien that Patrignani asked Dixon whether he could "go get the gun" from the bedroom, and that Dixon answered affirmatively. We find that the Deputies' testimony was credible, and we therefore credit it as proof beyond a preponderance of the evidence that Dixon in fact voluntarily consented to the warrantless search. Thus, the search and seizure of the pistol and bullet-proof vest[8] did not violate Dixon's Fourth Amendment rights.[9]

B. Fifth Amendment's Requirement of Miranda Rights

The Government concedes that because the Marshals arrested Dixon before asking him about the gun, Dixon was entitled to be apprised of his Miranda rights before any custodial interrogation could take place. See Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S.Ct. 1602, 1627-28 (1966); see

[8] Having validly obtained Dixon's consent to search for the gun "under the bed," and having lifted the mattress in the course of that search, Dixon does not dispute -- nor could he persuasively -- that Patrignani validly discovered the bullet-proof vest in plain view. See United States v. Menon, 24 F.3d 550, 559-60 (3d Cir. 1994)(quoting from and citing Horton v. California, 496 U.S. 128 110 S.Ct. 2301 (1990))(setting forth the three-part test for determining the validity of a plain view seizure).

[9] While Dixon also complains that he was not given his Miranda rights before being questioned about the gun, such conduct, even if true, does not run afoul of the Fourth Amendment, see Kikumura, 918 F.2d at 1093 (noting the Supreme Court's rejection of courts' attempts "to Mirandize the [F]ourth [A]mendment consents"), but rather is a concern properly addressed in our Fifth Amendment analysis below.

also Rhode Island v. Innis, 446 U.S. 291, 297-98, 100 S.Ct. 1682, 1687-88 (1980). Any statements Dixon gave before being read his Miranda rights -- including those consenting to a warrantless search -- would violate his Fifth Amendment right to be free from compulsory self-incrimination. Accordingly, the Government must demonstrate by a preponderance of the evidence that it gave Dixon his Miranda rights, and that defendant waived them. Colorado v. Connelly, 479 U.S. 157, 168, 107 S.Ct. 515, 522 (1986)(reaffirming Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972)). In deciding whether Dixon voluntarily and knowingly waived his rights, we consider "'the particular facts and circumstances surrounding [this] case, including the background, experience, and conduct of the accused.'" North Carolina v. Butler, 441 U.S. 369, 374, 99 S.Ct. 1755, 1758 (1979)(quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938)).

Dixon first argues that the Marshals did not recite his Miranda rights before asking him about the gun. On cross-examination and at oral argument, Dixon sought to refute Deputy Patrignani's testimony to that effect by relying on the fact that Deputy O'Brien testified that he did not hear Deputy Patrignani read Dixon his Miranda rights. Dixon argues that Deputy Patrignani could not have fully read Dixon his rights in the short time it took Deputy O'Brien to perform the protective sweep of the two-room apartment.

We disagree. We credit the testimony of Deputies Patrignani and O'Brien that Deputy Patrignani could have taken at most thirty to forty-five seconds to read Dixon his rights while Deputy O'Brien was performing the protective sweep. It is understandable that Deputy O'Brien did not hear Deputy Patrignani read rights to Dixon because O'Brien was completely focused on securing the apartment for his safety and that of his fellow Deputies.[10] We therefore find that Dixon was given his Miranda

[10] We recognize that, as able defense counsel pointed out at the hearing, relevant portions of Deputy O'Brien's testimony before us regarding what he heard Deputy Patrignani say to Dixon -- and vice-versa -- do not completely mirror Deputy O'Brien's testimony on these points at Judge Hutton's May 13, 1998 revocation of supervised release hearing. See May 13, 1998 N.T. of Deputy Dennis O'Brien at 6-8; id. at 15-17. We do not think, however, that those differences are material for two principal reasons.

First, the nature of the two proceedings differs fundamentally. As opposed to the two and a half hour suppression hearing we held yesterday, revocation hearings (such as the forty-five minute one Judge Hutton held) are far more "informal," "flexible," "nonadversarial," and "discretionary," Scott, 118 S.Ct. at 2020-21, where "the traditional rules of evidence generally do not apply." Id. at 2021. Furthermore, as Scott reaffirmed, no Fourth or Fifth Amendment inquiry is necessary. Id. Thus, it is understandable that the Government did not seek to adduce extensive or exhaustive testimony at the revocation hearing where all it had to show was that Dixon had a gun in violation of Judge Hutton's specific proscription.

Second, this Court had the benefit of testimony of the central actor in this drama, Deputy Patrignani, who did not testify before Judge Hutton. More important than what Deputy O'Brien may have heard Patrignani say -- recollections that, tapped eight and ten months after the event, respectively, could be forgiven if shifting or incomplete -- was Deputy Patrignani's testimony of what he actually said and did, testimony that we found credible. Thus, the ambiguities or inconsistencies in Deputy O'Brien's third-hand testimony on the issues of Miranda rights and consent do not affect our conclusions here.

rights, and that he knowingly and voluntarily waived those rights before making inculpatory statements to the Deputies at his home.

We also find that Dixon waived his Miranda rights after being advised of them at his second custodial interrogation in the cellblock. Dixon does not dispute that the Deputies read him his rights, and that he signed under a statement so acknowledging. Instead, he argues that although he agreed to answer questions, he preserved his rights by refusing to sign the waiver of rights section of the form.

The Government need not, however, prove by a preponderance of the evidence that Dixon's waiver was express:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case.

Butler, 441 U.S. at 373. By his argument, Dixon seeks refuge in elevating form over substance, a tactic that Butler expressly prohibits. Agreeing to answer questions and doing so, rather than waiving Miranda rights on a government form, is simply a rose of another color.

Moreover, we have little trouble concluding that Dixon understood his Miranda rights before he knowingly waived them. Dixon is a high school graduate and no stranger to law enforcement. His Probation Officer, who had at least three dozen interactions with Dixon, found him to be intelligent and

coherent. Furthermore, it is clear from the Probation Officer's testimony that Dixon knew that under an express term of his supervised release Judge Hutton had forbidden him to possess a firearm, and thus Dixon was aware of the palpable effect his statements would have on his freedom. Dixon thus knowingly waived the protections Miranda affords.

An appropriate Order follows.

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ORDER

AND NOW, this 16th day of July, 1998, upon consideration of defendant's motion to suppress physical evidence and statements, and the Government's response in opposition thereto, and after a hearing on July 14, 1998, and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion is DENIED.

BY THE COURT:

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Stewart Dalzell, J.